SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-698

FRIENDS OF THE EARTH, WASATCH MOUNTAIN CLUB, INC. and KENNETH G. SLEIGHT,
Petitioners,

—v—

GILBERT R. STAMM, Commissioner, Bureau of Reclamation, and ROGERS C. B. MORTON, Secretary of the Interior,
Respondents,

and

STATE OF COLORADO, *et al.*,
Intervenors-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF NEW YORK, IDAHO, ILLINOIS, MICHIGAN, TEXAS, AND VERMONT AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Opinions Below

The opinion of the District Court for the District of Utah is reported as *Friends of the Earth* v. *Armstrong,* 360 F. Supp. 165 (D. Utah 1973) (Pet. App. A). The opinion of the Court of Appeals is reported unofficially as *Friends of the Earth* v. *Armstrong,* 5 Env. Rptr. Cases 1694 (10th Cir., decided Aug. 2, 1973) (Pet. App. B).

Jurisdiction

The Court has jurisdiction to review this matter on writ of certiorari under 28 U.S.C. § 1254(1).

Questions Presented

1. Has Section 3 of the Colorado River Storage Act of 1956 (43 U.S.C. § 620[b]), which explicitly forbids a dam or reservoir within any national monument, been impliedly repealed or rendered inoperative merely by the failure of Congress to appropriate money to construct structures to divert waters from Rainbow Bridge National Monument?

The District Court held that it has not. The Court of Appeals (two judges dissenting) held that it has.

2. Is the decision of the Court of Appeals a usurpation of the legislative function and a violation of the doctrine of separation of powers?

Although the question was not explicitly discussed by it, the Court of Appeals majority presumably concluded that it was not. The dissent held that it was.

Interest of the *Amici* States

Nearly all of the States of the Union, including those participating here as *amici*, have national parks or monuments located within their borders. New York has the recently-established Gateway National Park, as well as Saratoga National Historical Park, Fort Stanwix and Castle Clinton National Monuments, and Fire Island National Seashore. These national parks are managed by the National Park Service within the Department of Interior, and held in trust for all Americans, present and future, and whether or not residents of the states within which the

particular park is located. The natural resources managed by the Park Service—both parks and monuments —are required by the Congress to be steadfastly maintained against encroachments so that they will remain "unimpaired" for the use and appreciation of all Americans, as well as visitors, and to be preserved in order for posterity to continue to share in the heritage of our Nation. 16 U.S.C. § 1.

The decision of a divided Court of Appeals in this case has undermined a fundamental tenet of the trust in which these resources are held for every American citizen. The thrust of this extraordinary and radical decision is that, notwithstanding an express Congressional prohibition of *any* encroachment on parkland, that mandate can be considered impliedly repealed simply by a failure to provide adequate funding to construct a diversionary channel for waters from the dam. Such an interpretation, in the face of the repeated refusal of Congress to enact legislation before it expressly repealing the prohibition against encroachment, does violence to the letter and spirit of the law and exposes national parks and monuments in every state to similar destruction in the future.

Natural wilderness, once impaired, cannot be returned to its original state. If the passage of legislation providing for construction of a dam many miles from a particular national monument can be used to justify the repeal by implication of an express prohibition against irreversibly invading that monument, then all our national parks will be vulnerable to future invasion through various appropriations devices and innocuous resource-management acts which will render such protective prohibitions, enacted for the benefit of every citizen as well as future generations, all but meaningless.

For these reasons this case presents a vivid instance of the accuracy and prescience of Donne's reminder that if a clod be washed away, Europe is the less.

Statement and Reasons for Granting the Writ

The *amici curiae* adopt as their statement of the case and reasons for granting the writ the statement and reasons set forth in the Petition for Certiorari, adding the following reasons.

Importance of Granting the Writ

The pernicious decision of the court below stretches far beyond the narrow confines of Rainbow Bridge National Monument. It is an attack upon a principle central to our National Park System—that unless and until the Congress enacts legislation specifically authorizing the invasion of portions of the park system for purposes unrelated to the preservation of our national heritage, the parklands and monuments under the management of our National Park Service shall not be invaded to the detriment of the American public.

This principle, once tarnished, cannot be retrieved. While the particulars of the instant case are unique to the Rainbow Bridge Monument, the basic conflict is one which could apply to any of our national parks or monuments in the future and the decision below, if allowed to stand, could be used to rationalize such assaults. Section 3 of the Colorado River Storage Act of 1956, 43 U.S.C. §§ 620, 620-b ("the Act") states unequivocally that "no dam or reservoir constructed under the authorization of this Act shall be within any national park or monument." No time limit was placed by Congress on this protection, and no exceptions for incursions resulting from dams were carved out. While Congress authorized the Secretary of Interior under § 1 of the Act to "take adequate protective measures to preclude impairment of the Rainbow Bridge National Monument," the far broader import of § 3 is that whether or not funds for such

protective measures were appropriated, the Congress explicitly barred any such encroachment on parkland under the Act. This is buttressed by the explicit language of the Conference Report (102 Cong. Rec. 5768 [1956]), cited at pp. 5-6 of the petition, expressing "clear[ly] the intention of the House that there be no invasion or impairment of the national park system by the works authorized to be constructed * * *."

Several years later, attempts were made in Congress to permit the use of the lands in the Monument area to be used as a water storage area for the Glen Canyon Dam. A total of eight different bills were introduced to repeal or alter § 3 of the Act. Not one of these bills was enacted.

While these facts are, or should be, dispositive of the issues presented here, the court below was persuaded by other actions of the Congress that the Congress had retreated, consciously or unconsciously, from its vigilant protection of Rainbow Bridge National Monument. It based this conclusion on the fact that Congress prohibited funds appropriated for public works from being used for the construction of the protective facilities referred to in § 1 of the Act. See 74 Stat. 743 (1960); Petition, p. 3, fn. 1. But this falls far short of any sort of proof that Congress intended thereby to undermine the express protection it had furnished Rainbow Bridge. This is particularly so since the protective works themselves raised serious engineering and other problems (Appendix B, LXII-LXIV) and the Commissioner of Reclamation, in charge of operations at Glen Canyon, himself stated that § 3 of the Act "could very probably limit the operation of the Glen Canyon [unit] to a reservoir pool below the level that would infringe upon the monument area."*

In addition, in 1968, as part of entirely separate legislation, Congress authorized a number of projects which

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* See Petition p. 6.

contemplated operating the Glen Canyon Reservoir at a level which would cause water to back up into the Monument. No mention was made of national parks or monuments or of § 3 of the Act, and the use of the dam in such a way as to cause the waters impounded by it to invade the Monument was not specifically required. Thus neither of these reasons given by the court below for its decision provide any basis for overriding the clearly stated mandate of Congress.

The decision below rested heavily on the contention that the Glen Canyon Dam cannot be efficiently utilized without invading Rainbow Bridge National Monument. But if true this is a problem for Congress to remedy, and presumably when it does so it will take the necessary steps to assure the integrity of the Rainbow Bridge National Monument, as it has repeatedly done since the establishment of the monument by President Taft. Should it decline to do so, Congress, and it alone, has the authority to remove the Monument from those areas meriting protection.

The court below, however, volunteered to solve the problem for Congress, substituting its judgment for that of the Legislature. It concluded, first, that § 3 of the Act had been impliedly repealed, a decision that flies in the face of settled rules of statutory construction, and second, that Congress, if given the choice, would not have seen fit to continue the protection of the Rainbow Bridge National Monument required by § 3, a determination that second-guesses the intentions of Congress and does violence to the doctrine of separation of powers.

Should this decision stand, it would jeopardize the sanctity of the National Park System. A holding that authorization for a regional water storage project, coupled with failure to appropriate funds for a channel to divert the water so impounded from a national monument, dissipates the most strongly-worded Congressional barrier against

encroachment, and amounts to a judicial breaching of that barrier which only Congress may remove.

The court below exceeded its jurisdiction when it concluded that a National Monument could be invaded on the basis of the dubious claim of a repeal by implication of the statute which so plainly protects it from such invasion. Encroachments on parkland in Utah can one day become encroachments on a National Park in any state. The decision below presents a fundamental issue for this Court to resolve, an issue bearing the most far-reaching consequences for our National Park System. For the decision below, if permitted to stand, threatens to provide judicial sanction for the piecemeal dismemberment of a system of National Parks, Monuments, and Seashore and Wilderness areas which Congress unequivocally mandated be preserved for future generations.

CONCLUSION

For the foregoing reasons, in view of the issues here involved, the petition for certiorari should be granted.

Dated: New York, N. Y., November 26, 1973.

Respectfully submitted,

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